

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	15-CR-00637(KAM)
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
EVAN GREEBEL,	:	Monday, June 18, 2018
	:	9:00 a.m.
Defendant.	:	
	:	

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TRANSCRIPT OF CRIMINAL CAUSE FOR HEARING
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

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1 THE COURT: All counsel are present, this is the
2 continuing FATICO hearing, United States versus Evan Greebel,
3 15-CR-637. Will the parties please state their appearances.

4 MS. SMITH: Good morning, Your Honor, Alixandra
5 Smith, David Pitluck and David Kessler for the Government.

6 Also at counsel table Special Agent Sean Sweeney.

7 THE COURT: Thank you. Good morning.

8 MR. BRODSKY: Good morning Your Honor, Reed Brodsky,
9 and Erin Galliher from Gibson Dunn & Crutcher on behalf of
10 Evan Greebel who is here present with us.

11 THE COURT: Thank you, good morning.

12 I would like to get a preview of what today's --

13 MR. BRODSKY: Mr. Mastro is here also.

14 THE COURT: If you can give me an idea on the
15 record, as to how you intend to proceed today, and I think you
16 wanted to address an issue of the notebook.

17 MR. BRODSKY: Your Honor, with respect to today's
18 proceeding, I believe the Government is cross examining Dean
19 Ferruolo, and our next potential witnesses is Zachery Prinsky,
20 and depending on the cross examination, we will then make a
21 decision as to whether we call Mr. Prinsky, he is here today,
22 and is available to testify.

23 The Government-- the Court ordered us to make
24 available the handwritten notes in the original form to the
25 Government. The Government E-mailed me to ask for them. I

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1 said I would make arrangements to do it. I meant to
2 personally do it. Last week I had sudden travel and
3 therefore, did not do it. I apologize to the Court and to the
4 Government for that.

5 I will make them available at the Government's
6 convenience today or any time this week. I unfortunately will
7 not be able to do it, but anybody -- we will have somebody
8 else do it, Ms. Galliher will be able to do it.

9 THE COURT: Well, when you mentioned that this
10 morning Mr. Brodsky, I told you I was inclined to preclude
11 these notes because I had ordered this on June 1st, and
12 despite your travel schedule, whatever it was, in the past
13 18 days, I don't understand why you would not be willing to
14 comply with my order. This is not the first time that you
15 have not followed my orders regarding deadlines. I don't
16 think it is fair to the Government yet again to give them
17 documents that they have not yet seen and ask me to admit and
18 consider them.

19 I am happy to hear from the Government. I don't
20 want to leave this hearing open another day.

21 So, that is my inclination.

22 MR. BRODSKY: These are just the originals, they
23 have the handwritten notes that are copies, these are the
24 originals of them. So we are only offering-- we are offering
25 the originals, as you know, as just fact that they are the

1 originals.

2 The Court has the copies and as does the Government
3 with respect to the actual handwritten notes we are seeking to
4 offer, the handwritten notes taken during board meetings.

5 THE COURT: I understand that. They did raise
6 concerns that they wanted to see the originals and to look at
7 the entire books in context.

8 If that hasn't been done yet, I am disinclined to
9 admit them. If the Government is willing to look at the
10 originals that they have not yet been-- that have not yet been
11 produced despite my order, I will consider it. I am just--
12 really Mr. Brodsky, this is not the first time.

13 MR. PITLUCK: Obviously we requested to see the
14 original in the hearing almost three weeks ago. We have not
15 gotten them. I think that sort of obfuscates the point, which
16 is we looked into this legally. These are so problematic,
17 both the notes themselves, and the defendant's proffered
18 interpretation of the notes. That even if we saw them, which
19 we have not, and which we understand the Court's concerns
20 about the delay.

21 There is-- we know that Your Honor has wide
22 discretion, but how are we to dispute what is written, how are
23 we to dispute the contents, how are we supposed to verify the
24 authenticity. These are the defendant's interpretation of the
25 defendant's statements. When they were created, even if we

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1 saw them, it would be completely inadmissible and irrelevant
2 for those reasons.

3 So, you know, if Your Honor orders us to look at
4 them, we will certainly do so. But we think it was
5 unnecessary weeks ago, it is certainly unnecessary now both
6 legally and factually.

7 THE COURT: I think you had asked to see the
8 original three weeks ago. I had ordered that they be provided
9 so that you would have that opportunity.

10 I understand you have a more fundamental objection
11 to the admissibility period, whether or not you could see the
12 originals. But, my concern is that as I recall, you had
13 raised the possibility that there was no way to really verify
14 when the entries were made, what was added, what was changed,
15 what if anything-- I think you had made a case for seeing the
16 originals, which is why I ordered it, before deciding in the
17 first place whether or not to admit them at all.

18 But, it is your position now you don't need to see
19 it.

20 MR. PITLUCK: If the Court is inclined to consider
21 them.

22 THE COURT: I ordered them.

23 MR. PITLUCK: We are just doing our job and our
24 diligence as I am sure the Court understands to see if there
25 is anything on the face. We have not seen them in the

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1 context. But I think it was such a minor point, that even if
2 we saw them, there is nothing that would authenticate them in
3 the time they were taken. Maybe just things that were called
4 into question.

5 I think the point, Your Honor, is larger. As we sit
6 here now three weeks later and we are now talking about
7 delaying this yet again, with a sentencing scheduled in
8 approximately seven or eight weeks. We are just making the
9 point, Judge, even if we were to look at these now and the
10 Court wanted to look at them. We would be further delayed and
11 would not advance us anywhere.

12 I think if the Court is going to consider them, the
13 Court would ask us to consider them. We will look at them.
14 But, it creates a point of what we are we supposed to do about
15 the context and specifically sort of interpretation of what
16 they say.

17 THE COURT: Well, in their letter the defense raises
18 two points. I think one is that the hearsay rules should not
19 apply to this hearing, and second, that the notes are being
20 proffered in order to establish that Mr. Greebel's notes,
21 reflect the same content as the ultimate minutes that were
22 provided to Mr. Shkreli and Mr.--

23 MR. PITLUCK: I think there are two points. One is
24 that the hearsay issue is not the fundamental issue. This is
25 a due process issue of the defendant's statements coming in.

1 Effectively the defendant's testimony based on the
2 interpretation of the notes without us having any sort of
3 opportunity to cross examine.

4 As the Court saw in the trial, if somebody wants to
5 testify about their notes as the Court ordered, Mr. Richardson
6 was required to do, there is the opportunity to both direct,
7 cross examine and redirect him on what they said, when they
8 were made, how they were made, and in what context. That was
9 very important because it shed light on a lot of things that
10 were not written on the page.

11 Your Honor, that is just a fraction of what we are
12 looking at here. The defendant's notes, and then they are
13 trying to be compare them to later filed board minutes, that
14 are being used to try to justify what is included in the
15 notes. We are saying there is a whole problem with all of it.
16 We can't establish the order or when things were prepared
17 without the opportunity to cross examine, it is all
18 meaningless. It doesn't tell us anything.

19 So, Your Honor, we are happy to look at the notes if
20 the Court wants to consider them. We can raise any
21 objections. I think there has been ample opportunity to do
22 that. But we are at a much more fundamental due process
23 basis. Evidence is being proffered that the Government has no
24 opportunity to rebut whatsoever.

25 There is a way to do this, and even without the

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1 hearsay rules in a FATICO hearing, this is far afield of that.

2 THE COURT: Do you want to address their argument
3 Mr. Brodsky?

4 Regarding the argument that they don't have an
5 opportunity to cross examine anyone about your interpretation
6 of Mr. Greebel's notes.

7 MR. BRODSKY: Your Honor, under the rules of
8 evidence, we believe they are admissible. The first question,
9 threshold argument is whether or not they are authentic. We
10 offered and the Government did not contest that they were
11 written by Mr. Greebel. We had offered to call as Your Honor
12 may recall, Ms. Greebel to testify that those are--

13 THE COURT: That is not the issue I asked you to
14 address.

15 MR. BRODSKY: Well --

16 THE COURT: What about that?

17 MR. BRODSKY: Once you get over the threshold issue
18 of authenticity then the question becomes whether or not they
19 are admissible in some form.

20 We believe respectfully Your Honor that-- Your Honor
21 can consider them in a FATICO hearing. Even if the rules of
22 hearsay apply, Your Honor can admit them as a business record.
23 They are contemporaneous documents taken during a Board
24 meeting. Minutes of a Board meeting are classic business
25 records. Even if Your Honor did not consider that, Your Honor

1 should look at them to -- on their face, read them.

2 Now, whether the Government has a different
3 interpretation of the words, or we have a different
4 interpretation, that is for Your Honor to decide. They don't
5 need a witness.

6 For example, an E-mail communication that they
7 offered into evidence, whether it became admissible that we
8 offered sometimes, between Mr. Greebel and Mr. Shkreli during
9 the trial. They offered some, we offered some.

10 They had more exceptions than we did. But we all
11 argued over the meaning of the words neither Mr. Shkreli was
12 testifying or Mr. Greebel. So I don't believe the fundamental
13 objection that we have, which they have no way to argue about
14 the content of them, is valid under the rules of evidence.

15 I believe once a document becomes admitted, you
16 don't need an actual witness who participated in the
17 communication to further the basis to argue what the context
18 means.

19 THE COURT: How are Mr. Greebel's notes relevant to
20 the issue of loss, which is the issue before me in the
21 hearing?

22 MR. BRODSKY: One of the things we wanted to put
23 forth Your Honor, is that what is critical under 2B1.1, is
24 reasonable foreseeability to Mr. Greebel, as to the settlement
25 agreement, consulting agreements, what was reasonably

1 foreseeable to him with respect to each one, as to whether
2 they were, as the Government claims, shams or frauds.

3 And we believe that the handwritten notes will
4 corroborate the typewritten minutes that were provided to Mr.
5 Panoff, the CFO at the time of Retrophin, and also Mr.
6 Shkreli, the CEO, at the time of Retrophin, by Mr. Greebel.

7 And that they will help us demonstrate that it was
8 not reasonably foreseeable that certain agreements that the
9 Government claims to have been shams in furtherance of the
10 conspiracy, in Count One or Count Seven, we will use them to
11 argue they weren't reasonably foreseeable to Mr. Greebel, to
12 be fraudulent.

13 THE COURT: So basically, you are asking me to make
14 findings that goes to the jury's determination after a 10-week
15 trial, to Count Seven.

16 MR. BRODSKY: It is our position based on the case
17 law we cited in the Second Circuit, that just because it is a
18 conspiracy conviction, that scope of the conspiracy and the
19 charge that Your Honor gave the jury is a lot broader than
20 what Your Honor needs to find with respect to Section 2B1.1 of
21 the sentencing guidelines.

22 Under section 2B1.1 of the sentencing guidelines,
23 Your Honor has to make a two part finding with respect to
24 them. On each, we believe, each agreement, at issue. Either
25 settlement agreement or consulting agreement.

1 It is perfectly valid for Your Honor to find, even
2 though there is a charge of conspiracy, the Government has not
3 demonstrated by a preponderance of the evidence that Mr.
4 Greebel, believed it was reasonably foreseeable on each
5 agreement to be a fraud.

6 For example, if Your Honor found that Doctor
7 Rosenwald, Mr. Rosenwald, the biotech investor who testified,
8 that he had made real litigation threats and that it was
9 reasonably foreseeable -- that wasn't reasonably foreseeable
10 to Mr. Greebel to be part of a conspiracy. Then it would be
11 perfectly valid for Your Honor to draw the conclusion that the
12 loss amount, any loss amount for that, would not be included
13 in the loss calculation.

14 And that we believe is the Second Circuit case law
15 that the scope of the conspiracy is far broader than what the
16 Court needs to find with respect to Section 2B1.1.

17 The Government did not ask for and did not get a
18 special verdict form, which listed out each settlement
19 agreement or consulting agreement. So we do not know if the
20 jury actually found any particular order on settlement
21 agreement or if it was fraudulent.

22 What they were instructed by Your Honor, was that
23 all they needed to find was that they were -- meet the
24 elements, that two individuals or more, entered into a
25 conspiracy, with the intent to commit fraud, and with respect

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1 to-- there was no-- there was-- and one overt act, in
2 furtherance of that conspiracy, which could be innocent, was
3 committed by anyone individually.

4 So there wasn't a finding by the jury that any
5 particular settlement agreement or consulting agreement was
6 fraudulent. Had there been a substantive count of wire fraud
7 with respect to settlement agreement or consulting agreement
8 that would be a different story.

9 MR. PITLUCK: So Your Honor, just without engaging
10 in oral argument on the motions, the fundamental issue here is
11 the admissibility of the notes.

12 While we certainly dispute these are business
13 records, even if they were, the only way to establish the
14 business record foundation is through the person who took the
15 notes. Which we have no opportunity to cross examine about
16 how they were made, when they were made, getting back to the
17 fundamental question.

18 So, even assuming that is accurate, we had a lot of
19 debate about that at the trial, as I'm sure your Honor
20 remembers. Even assuming we can do that, we don't have Mr.
21 Richardson on the stand. We don't have a representative from
22 Retrophin. We have the defendant, who is perfectly entitled
23 to exercise his Fifth Amendment right. But he can't use that
24 as a sword and shield.

25 If he wants to put them in as a business record and

1 he wants to establish when they were made and how they are
2 relevant to what we believe is the completely tangential issue
3 here, of what was foreseeable. Then he can do so. We will
4 cross examine based on that.

5 But, without that there is no way to establish even
6 the base level of admissibility, let alone relevance. This is
7 not just a matter of putting words before the Court. It is
8 actually reading them. This is almost an understanding of
9 what they actually say, and without that-- without our
10 opportunity to argue that, we are looking at letters written
11 on a page with no basis, with nobody to cross examine what
12 they say.

13 That-- then just leaving aside, as the Court pointed
14 out, the reasonably foreseeable standard is low. We have
15 demonstrated that by a preponderance at the trial many times.
16 The jury convicted on that basis.

17 Even if the notes were borderline admissible, even
18 if we had the basis to put them in, they are very little
19 relevance to loss. So now we are really, you know, the
20 Government is up against it in terms of trying to pin down
21 something we can't establish a basis of, for virtually no
22 probative effect, other than to say the jury was wrong.

23 So, Your Honor, for that-- those reasons, we think
24 this is all much a do about nothing. We are ready to continue
25 our cross examination of witnesses, whenever the Court wishes.

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1 THE COURT: All right. Let's continue with the
2 cross. I will think about this latest failure to follow my
3 orders and what effect it should have on the notes that the
4 defense seeks to admit.

5 Is the witness here?

6 MR. BRODSKY: Yes, Your Honor. He is right in the
7 back.

8 THE COURT: Good morning, sir, you are still under
9 oath, we will have you sworn again to be sure.

10 STEPHEN FERRUOLO, having been first duly sworn, took the stand
11 and testified further as follows:

12 CROSS EXAMINATION BY MS. SMITH: (Cont'g.)

13 Q Good morning, Mr. Ferruolo.

14 A Morning.

15 Q So, just to follow up on our discussion last time about
16 the fees that you are being paid. Are you being paid \$600 an
17 hour for your testimony here today?

18 A That is correct.

19 Q And defense counsel paid for your flight back from San
20 Diego; is that right?

21 A They have not paid for it. I expect to be reimbursed.

22 Q You flew business class for that flight?

23 A Yes, I did.

24 Q And you estimated last time that is about a twelve
25 hundred to fourteen hundred dollar ticket?

1 A It was more this time because it was summer, it was
2 seventeen hundred.

3 Q And, defense counsel is paying for your hotel if you stay
4 overnight tonight?

5 A I'm not--

6 Q You are flying back?

7 A Yes, I'm flying back.

8 Q And since your testimony on June 1st, what contact have
9 you had with the defense counsel?

10 A Very limited. I had contact with him in preparing a list
11 of documents that I had consulted in preparation for my
12 testimony, and had a brief contact when I received a
13 reimbursement check about a week ago.

14 Q So you didn't have any discussions about the content of
15 your testimony or anything else related to the case?

16 A No.

17 Q Regarding a list of items that you reviewed in connection
18 with your testimony, what steps did you take to put that list
19 together?

20 A I went back and looked at my notes and I looked at what I
21 had in my files and on that Monday when I was back in my
22 office, I completed the list.

23 Q Then how did you provide that list to the defense
24 counsel?

25 A I E-mailed it.

1 Q And, did you review the list that defense counsel
2 provided to the Court?

3 A No, I did not.

4 Q When you put that list together and E-mailed it to
5 defense counsel, did you make sure it was complete and
6 accurate?

7 A I did, yes.

8 Q So the list provided to defense counsel, provided by
9 defense counsel to the Court, on June 5th, said that you
10 reviewed Desert Gateway and Retrophin's SEC filings from 2012
11 and 2013, is that accurate?

12 A That's correct.

13 Q So, did you review any Retrophin SEC filings from 2014?

14 A Well, the 10K for the period ending 12/31/2013, which was
15 filed in March of-- roughly March of 2014, so in essence that
16 was a 2014 document. That had subsequent event disclosure
17 which went into 2014.

18 Q When you testified here on June 1st, you said you
19 reviewed SEC filings from 2014. So is it accurate that you
20 reviewed SEC filings from 2014, or not?

21 A That's what I just tried to clarify. The SEC filings
22 from 2014 that I reviewed was the 10K for the year ending
23 12/31/2013, which is filed in 2014.

24 Q So you didn't review any SEC filings from Retrophin that
25 were filed in 2014?

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1 A I don't recall having done so, no.

2 Q So, when you said that SEC filings went into 2014, last
3 time, because of the consulting agreements, you actually only
4 reviewed the 10K that was filed in 2013 with the subsequent
5 event footnote?

6 A That's correct.

7 Q With no additional SEC filings?

8 A That is my recollection, yes.

9 Q When we left off last time I asked you a few questions
10 about what you would do if you knew from personal experience
11 that there was an inaccuracy in a filing that you were
12 preparing. Do you remember those questions?

13 A Yes, I do.

14 Q I also asked if you remember discussing that topic with
15 defense counsel in preparation for your trial or your
16 testimony here today and you said, no.

17 Do you remember saying that?

18 A That is correct.

19 Q I will show you what is marked as Government Exhibit H-3.
20 For the record it is also labeled 26.2SF-3. It was provided
21 to the Government by defense counsel in December of 2017 and
22 it was represented to be notes of a call between Mr. Ferruolo
23 and defense counsel.

24 Permission to approach Your Honor?

25 THE COURT: Sure.

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1 Q Have you ever seen these before Mr. Ferruolo?

2 A No, I don't believe so.

3 Q If you can take a look at the top section which is about
4 a 13G?

5 A Yes.

6 Q 13G is a SEC filing; is that correct?

7 A Yes.

8 Q And then if you can look down to the seventh bullet
9 point, discussing the 13Gs which states: If I knew from unit
10 SOF board meeting or documents, that there was an inaccuracy,
11 I would point that out.

12 A Yes.

13 Q Do you see that?

14 A Yes.

15 Q Does that refresh your recollection that you discussed
16 the subject of inaccuracies in SEC filings with defense
17 counsel?

18 A This specifically relates to 13B or 13G? When I answered
19 your question, I was referring to basically to 34 filings-- 34
20 filings, periodic filings, 10-K, 10-Qs and 8-K.

21 Q So when you answered last time, you remember this
22 conversation, but you were thinking it was more-- my question
23 was more broad and this is more specific?

24 A You asked a question about disclosure. Am I correct?

25 Can you go back and repeat the question.

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1 Q Would you want to see your testimony from last time. It
2 has been marked as Government Exhibit H-4.

3 THE COURT: Why don't you show him.

4 MS. SMITH: Yes, just for the record.

5 THE COURT: This is Mr. Ferruolo's June 1st,
6 testimony?

7 MS. SMITH: Yes, Your Honor.

8 Q So if you wanted to take a look, the questions I was
9 asking you starts on page 229 of Government Exhibit H-4.

10 A Yes. Respectfully, this has nothing to do with SEC
11 filings, this has to do with representations and warranties in
12 a stock purchase agreement for a PIPE transaction.

13 Q So-- Mr. Ferruolo, just for the record, the question I
14 asked starting on page 229 at the bottom line 24 was, in the
15 process of helping to draft SEC filings for clients, if you
16 had personal knowledge that something in the SEC filing was
17 inaccurate, you would have said something to the client,
18 correct?

19 That was the question that was asked.

20 A Okay. Yes, again SEC filings, I was referring here to 34
21 Act filings that involved material disclosure and by which I--
22 as I said before, periodic filings, 10-Ks, 8-Q's, and 8-K's.

23 Q So a 13G, a 13D, those are not SEC filings?

24 A Yes, they are SEC filings but in my view they are not
25 disclosure filings, they are not things that I normally

1 reviewed.

2 Q So, the question is, if you knew that there was an
3 inaccuracy in a SEC filing, would you have said something
4 about it to your client?

5 A Yes.

6 Q Last time you testified, you said it was only the second
7 time you have been in a courtroom and this is the third; is
8 that right?

9 A That is correct.

10 Q And the first time was as a witness in a SEC proceeding,
11 right?

12 A That is correct, yes.

13 Q And for the record, the SEC proceeding that you testified
14 at was SEC versus Michael Patterson in the Northern District
15 of California?

16 A That is correct.

17 Q And Michael Patterson was an executive of a company
18 called Embarcadero Technologies, right?

19 A He was not an executive. He was the controller.

20 Q And the CFO of Embarcadero Technologies was Raj Sabhlok,
21 S-A-B-H-L-O-K?

22 A That's right.

23 Q And the CEO of Embarcadero was Steven Wong, W-O-N-G; is
24 that right?

25 A That is correct.

1 Q And in the late 2000's, around 2008, the SEC sued
2 Patterson, Wong and Sabhlok, for hiding payments of more than
3 \$14 million from backdated stock options; is that right?

4 A That's correct.

5 Q Ultimately Wong and Sabhlok admitted guilt and Patterson
6 was found guilty?

7 A That is correct.

8 Q Embarcadero Technologies, was a client of yours, when you
9 were partner at Hellerman Ehrman, correct?

10 A Yes.

11 Q You personally served as outside counsel for Embarcadero
12 Technologies?

13 A Yes, I did.

14 Q In that engagement, your client was the company
15 Embarcadero Technologies; is that right?

16 A That's correct.

17 Q As outside counsel your duty of loyalty was to the
18 company, correct?

19 A Yes.

20 Q The individual executives that were charged, Patterson,
21 Wong, Sabhlok, those were not your clients, correct?

22 A That is correct.

23 Q And you previously testified you were not aware at the
24 time of any wrong doing by those executives; is that correct?

25 A Yes.

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1 Q And if you had been aware of wrong doing by Patterson,
2 Wong and Sabhlok, you would have advised your client
3 Embarcadero Technologies of that wrong doing, correct?

4 A Yes.

5 Q So, let's turn to your opinions in this case. Do you
6 have a copy of your report up there?

7 A No, I do not.

8 Q So, for the record, it is defense Exhibit 614-1. I have
9 extra copies.

10 THE COURT: This is already in evidence. Thank you.

11 Q So we can start by looking at paragraph 12. One of your
12 opinions in paragraph 12 is that to the extent that outside
13 counsel is involved in settlement agreements, they act at the
14 direction of the client with respect to the parties to the
15 agreement and the material terms; is that right?

16 A Yes.

17 Q And it is also your opinion that the decision to enter
18 into a settlement agreement, or not to enter into a settlement
19 agreement, is a business judgment determination, and that
20 determination is left to the client, correct?

21 A Yes.

22 Q And that is because the company is best situated to make
23 the business judgment determination about whether a particular
24 settlement agreement or other agreement is in the best
25 interest of the company, correct?

1 A Yes.

2 Q And you would agree with me that when it comes to
3 settlement agreements, the role of outside counsel, is really
4 to provide advice to the client, about what counsel believes
5 is the best course of action, right?

6 A Yes.

7 Q Outside counsel helps the client weigh the pros and cons
8 of entering into a particular agreement, right?

9 A In terms of the legal ramifications of the agreement,
10 yes.

11 Q And may also help the client determine if they decide to
12 enter into the agreement what terms they should consider
13 including; is that right?

14 A In terms of legal terms, yes.

15 Q And advising a client about what a decision to make--
16 whether to enter or not enter into a settlement agreement, you
17 would provide as outside counsel, the client with all
18 information that you had that might impact on that decision,
19 correct?

20 A That is correct.

21 Q And in the course of your long career, 20 years in
22 private practice, you never withheld information from a
23 client, when advising that client on such a decision, did you?

24 A No.

25 Q And you certainly never entered into a settlement

1 agreement or other agreement on behalf of the client, without
2 making sure that your client agreed that that agreement was in
3 the best interests of the company?

4 A Well, I don't know what you mean, enter into it. It
5 would not be within my power to enter into an agreement, it is
6 the company's agreement.

7 Q But you did not facilitate, for example, entering into an
8 agreement without ensuring that the company had determined
9 that that agreement was in the best interest of the company?

10 A Yes.

11 Q And in this case, you didn't review the board minutes, or
12 board documents or E-mails, or any testimony from any board
13 members, so you didn't engage in any analysis about whether
14 the settlement or consulting agreements you reviewed were in
15 fact in the best interest of Retrophin, correct?

16 A The analysis I relied on was the SEC filings.

17 Q But you yourself did not reach any independent decision
18 or conduct any independent analysis?

19 A As I said, my opinion was based on my review of the SEC
20 documents and my experience representing life science
21 companies. I did not review other documents.

22 Q And your opinions in this report are not specific to
23 Retrophin, correct?

24 A That is correct.

25 Q Turning to paragraph 11 of your report. You talk here

1 about resolving potential litigation against companies?

2 A Yes.

3 Q So, when a company decides whether or not to enter into a
4 settlement agreement, there are a lot of factors to consider,
5 correct?

6 A Correct.

7 Q And you don't necessarily settle every time someone
8 threatens litigation, correct?

9 A Not every time, but rather often.

10 Q But before you make a decision, you weigh the costs and
11 the benefits of entering into a settlement agreement?

12 A The company does, yes.

13 Q And that analysis includes the review of the legal merits
14 of the claim, correct?

15 A Yes.

16 Q And the factual merits of any potential claim?

17 A Yes.

18 Q You might be willing to pay more or less depending on the
19 strength of the claim; is that right?

20 A That is correct.

21 Q And the analysis might involve the likelihood that the
22 person who is threatening litigation will actually follow
23 through with that litigation, correct?

24 A Yes.

25 Q And in this case, you didn't include in your report any

1 specific opinions as to how consideration of these factors led
2 to the settlement and consulting agreements at issue for
3 Retrophin, correct?

4 A No, it was largely based on the context of understanding
5 the situation at Retrophin was in at the time.

6 Q But again, your opinions are not specific to Retrophin,
7 correct?

8 A That's correct.

9 Q And so, your-- you didn't conduct any analysis of the
10 specific factors that might have led to the consulting and
11 settlement agreements in this case, correct?

12 A The specific analysis is understanding the general
13 situation of early stage life science companies seeking to
14 raise financing.

15 Q So the answer is no?

16 A Please repeat your question.

17 Q In this case, you didn't provide any specific opinion as
18 to what the consideration of the factors were at Retrophin,
19 that led to the settlement and consulting agreements?

20 A They were factors behind my opinion.

21 Q Are you saying that you have opinions that are not in
22 your report?

23 A No, I am saying that in rendering my opinion, I carefully
24 weighed my long experience in life science companies and
25 generally understanding the situation a company like Retrophin

1 was in, it did not come out of thin air, it was based on
2 experience and deep understanding of the industry.

3 Q But you didn't review the board minutes, right?

4 A I did not, no.

5 Q And you didn't review any board documents or E-mails,
6 correct?

7 A That is correct.

8 Q No notes of board meetings?

9 A I did not.

10 Q No testimony of any board members?

11 A No.

12 Q And you said that you didn't understand when you
13 testified last time, the actual considerations that went into
14 the settlement agreement and consulting agreements here?

15 A The considerations made by the board members, no.

16 Q And so you don't know how those factors were weighed or
17 not weighed by the company in this case, correct?

18 A That is correct.

19 Q So the only thing you are relying on is your experience
20 and not anything specific that actually happened in connection
21 with how the Retrophin board members did or did not reach
22 these decisions?

23 A That is correct.

24 Q Turning to paragraph 11 again. You talk about litigation
25 releases in settlement agreements. Right?

1 A Yes.

2 Q And you said that ideally those releases are as broad as
3 possible?

4 A Yes.

5 Q And so that means, broad both in terms of claims that can
6 be brought and the parties that can be sued, right?

7 A Yes.

8 Q And, Mr. Brodsky walked you through a few hypotheticals.
9 With respect to settlement agreements, let's consider a
10 settlement agreement where party A agrees to pay party B, to
11 settle party B's potential claims against party A.

12 As part of that settlement agreement between party A
13 and B they can also agree to release claims against a third
14 party, say party C, correct?

15 A That is correct.

16 Q Even though party A is the only person actually paying
17 money to party B?

18 A That is correct.

19 Q So does that litigation release in the agreement have
20 value to party C, the party that is being released without
21 paying any any money?

22 A Yes, it would.

23 Q And if your client is party C, the entity that didn't pay
24 any money but had its claims released, you would have gotten a
25 pretty good deal for your client, correct?

1 A It certainly would be good for that client, yes.

2 Q You would have gotten protection for litigation without
3 actually paying for it, correct?

4 A Party C, yes.

5 Q Turning to paragraph 13 of your report.

6 A Yes.

7 Q You have a general opinion that while outside counsel may
8 act as corporate secretary and take notes during board
9 meetings, it is not typically the responsibility of that
10 person to set agendas for board meetings. This is based
11 entirely on your experience, correct?

12 A Correct.

13 Q You didn't look at any documents related to the Retrophin
14 board, you don't know what the responsibilities were of
15 various parties in this particular case, correct?

16 A The only documents I looked at were the-- I looked at the
17 relevant documents were the bylaws.

18 Q Which bylaws did you look at?

19 A The bylaws that were in effect in early 2013.

20 Q Which bylaws were those?

21 A The Desert Gateway bylaws.

22 Q And so, is your opinion here based on those bylaws?

23 A No, my opinion is based on experience. But you asked me
24 if I looked at any Retrophin documents. That was the document
25 I looked at that would be relevant.

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1 Q But your opinion is not actually based on that document?

2 A That is correct.

3 Q And when you were asked on direct, you were asked about
4 the role of outside counsel and you said it was to record the
5 minutes of board meetings when you are serving as corporate
6 secretary, correct?

7 A It is the role of corporate secretary.

8 Q So, when you are serving in the role of corporate
9 secretary, you personally served in that role, you were
10 serving as a scribe, right, taking down what happened at the
11 meeting, correct?

12 A That is correct.

13 Q And then when you were done taking those notes, you
14 turned them into typewritten minutes; is that correct?

15 A That is correct.

16 Q And then you forward them to either to the board or to
17 whatever committee of the board, the minutes that you were
18 taking of, and it was up to the board or that committee, to
19 actually review and formally approve the notes?

20 A No, typically --

21 MR. BRODSKY: Your Honor, I think the witness is
22 going to answer. She is asking multiple questions.

23 MS. SMITH: I can break it down.

24 THE WITNESS: Please do, thank you.

25 Q So we were talking about how when you served as corporate

1 secretary, are just a scribe, you take notes and then you turn
2 those notes into minutes, written, typewritten minutes?

3 A That's correct.

4 Q Then you forward them to the board or relevant board
5 committee, is that correct?

6 A No. Typically my practice and typical practice is to
7 send them to the person at the company, who interacts with the
8 board.

9 Q From there, are you saying the board or the committee
10 approves those minutes; is that correct?

11 A Well, shall I go through it sequentially.

12 So typically the process would be, I draft the
13 minutes, I would send them to the person at the company who
14 interacts with the board.

15 Q Yes.

16 A That would vary company by company. But typically an
17 officer in the company, CFO or the CEO. Okay. And then what
18 would typically happen is, that that officer in terms of
19 preparing the agenda for the next board meeting or some
20 subsequent meeting, would put-- distribute those minutes to
21 the board members, or to the committee members for approval.
22 That was the normal process that I used and, it is pretty
23 typical practice.

24 Q Was that the process you used when you were at
25 Embarcadero Technologies?

1 A That's correct.

2 Q I will show you what is marked as Government Exhibit H-6.
3 It is a trial transcript from one of the days in which you
4 testified in the SEC proceeding we discussed earlier.

5 Can you take a look at page-- you can look at any
6 portion you want. I will focus you on page 1266 of that
7 proceeding.

8 Just for the record, this is a transcript from
9 September 14th, 2010, in the Northern District of California,
10 in the Matter of the SEC versus Raj Sabhlok, and Michael
11 Patterson.

12 A Yes.

13 Q If you can start with the question at the bottom of page
14 1266. You were asked, it was?

15 THE COURT: What line?

16 MS. SMITH: Line 21.

17 THE COURT: Thank you.

18 Q You were asked, it was important to you that these notes,
19 you just told us you took these in the course and scope of
20 your work for Embarcadero Technologies, you made sure the
21 notes at the time, and you did your best to make sure they
22 were true and accurate.

23 Then, the questioner says, did I get that all right.
24 You said in response, that is correct.

25 And then the notes were sent to the committee and

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1 the committee formally approved them. It was up to the
2 committee to approve that the notes were consistent with what
3 happened at the meeting.

4 Was your testimony in this matter accurate?

5 A Yes.

6 Q You also gave some testimony on PIPE transactions?

7 A Let me --

8 Q That was the question.

9 MR. BRODSKY: May I have the chance to redirect
10 given that this didn't come up and I know Your Honor said
11 there is no redirect at all. Given that these are-- raising
12 new issues.

13 MS. SMITH: We can argue about this at the sidebar.

14 THE COURT: We will do that.

15 (Sidebar.)

16 MR. BRODSKY: I know last time we were at the
17 hearing, you said that we would not have a chance to redirect.

18 THE COURT: You agreed it is not that I directed. I
19 said I wanted to make sure you have everything covered in your
20 direct. We need to move this along, before you sit down,
21 because I'm not interested in having volleys of direct and
22 redirect and cross and recross.

23 MR. BRODSKY: Understood.

24 THE COURT: You agreed to it.

25 MR. BRODSKY: Since I don't anticipate, never

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1 anticipated these kinds of questions. I believe some of them
2 are outside of the scope of the direct. I will ask Your Honor
3 to redirect. If Your Honor decides that I can't redirect, I
4 understand, I respect that. I need to for the record, ask for
5 redirect.

6 It is clear Mr. Ferruolo wants the opportunity to
7 explain something, it is clear the Government is not letting
8 him explain.

9 This is a FATICO hearing to try to get right certain
10 things, not to try to cut somebody off who is trying to
11 explain something. There are a series of questions in which
12 the Government has created a misimpression. I believe that--
13 I am duty bound to correct that misimpression.

14 THE COURT: All right. Let's stop labeling what the
15 Government is doing. They are not labeling what you are
16 doing. Let's just stay with the testimony of the witness.

17 Do you want to be heard on the opportunity to
18 redirect?

19 MS. SMITH: First of all, if Mr. Brodsky thinks
20 something is beyond the scope, he should object. He doesn't
21 get to afterwards characterize portions of testimony that he
22 didn't object to as beyond the scope.

23 I don't think-- I mean everything is tied to the
24 opinions he has given. I don't think that is a fair
25 characterization. If he wants to make an objection, he should

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1 make it at the time, otherwise we don't know what it is.

2 Secondly, Your Honor said, no redirect. This is
3 very much within the scope of cross. It goes to his-- he
4 talks-- everything is about his experience. When you actually
5 look at his experience and what he has testified about before,
6 it is different than what he is saying now.

7 He is now inserting some additional step in between,
8 in terms of how he processed his notes, that he didn't testify
9 about eight years ago. It is perfectly fair cross. I don't
10 think there is any reason for redirect. Obviously then if
11 there is redirect, then there is recross. It doesn't sound
12 like Mr. Brodsky's redirect is limited to this one question.

13 THE COURT: Well, I would perhaps give him latitude
14 for this one question on the one issue that Dean Ferruolo
15 seemed to want to say more.

16 MS. SMITH: Right.

17 THE COURT: That is it.

18 MS. SMITH: I respectfully disagree. I am sure Mr.
19 Ferruolo has lots of things he would like to volunteer, I
20 don't think that is necessarily appropriate.

21 MR. BRODSKY: The other thing, I would ask for
22 redirect. The Government has cross examined Mr. Ferruolo and
23 repeatedly asked questions, you would ask your client to do
24 this. You would confer with your client, to weigh the risk
25 and benefits of litigation.

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1 Dean Ferruolo, I expect would testify, if Your Honor
2 allowed me to redirect, was in those circumstances, with
3 respect to early stage life science companies, the founder and
4 the CEO, controlled company, basically. And there was a small
5 board, as there was in Retrophin.

6 The client in that circumstance, was the CEO, or the
7 Chairman. So, every time, Ms. Smith asked, you would ask the
8 client to weigh the positives and the negatives, the risk and
9 benefits, the client in that circumstance is the company, and
10 the company acted through somebody.

11 THE COURT: Through a board.

12 MR. BRODSKY: Dean Ferruolo would testify, early
13 stage life science companies, the board, who he spoke to was
14 the CEO or Chairman. If the CEO said, this is in the best
15 interest of the company, he would follow it. That is a very
16 different thing than an impression created by the Government,
17 through their cross.

18 THE COURT: Mr. Brodsky, Mr. Ferruolo certainly had
19 whatever facts you chose to give him regarding the
20 circumstances of the Retrophin board and how it operated
21 regarding decisions to settle cases or to enter into
22 consulting agreements.

23 And his report could have discussed those specifics
24 with regard to Retrophin. Or with regard to early stage life
25 science companies that were minimally or thinly staffed. But

1 you know he didn't offer those opinions. I don't think it is
2 appropriate now, on redirect to bring up what could have been
3 proffered in the first place.

4 MS. SMITH: Frankly --

5 MR. BRODSKY: He did testify on direct examination,
6 he did, that the person who he spoke to on the client, was the
7 Chairman or the CEO. And the Chairman and the CEO told him
8 and made the decision.

9 THE COURT: So his testimony speaks for itself. You
10 have it on direct. You don't need to redirect him on that. I
11 will look at the whole transcript of the testimony.

12 Thank you.

13 (Open Court.)

14 BY MS. SMITH:

15 Q Mr. Ferruolo, just turning to your opinions on PIPE
16 transactions which are paragraphs 15 and 16 in your report.

17 It is your opinion that PIPE investors get benefits
18 in addition to the actual stock that they receive in the PIPE,
19 correct?

20 A That is correct.

21 Q And those benefits are things like discount off the
22 market share price and warrants, right?

23 A Among other things, yes.

24 Q You also talk about the full protection last time?

25 A There are also things, participation rights, there are

1 certain contractual rights relating to subsequent financings
2 and things like that. There is a package of benefits, yes.

3 Q For the February 2013 PIPE, what was the package of
4 benefits?

5 A First of all, there was a discount to the market price, I
6 think that discount was fifteen percent. Number two, there
7 was warrant coverage, I believe that warrant coverage was
8 fifty percent. There were 5-year warrants and those warrants
9 were exercisable, I think at 360, twenty percent above the
10 market price.

11 They had full ratchet protection on the down side.
12 I did think one mistake that I made, when I talk more
13 generally. In this case it was absolutely a full ratchet. If
14 there was subsequent financing, the warrant price was adjusted
15 back to that number.

16 Let's go next, there were registration rights and
17 those registration rights carried liquidated damages. The
18 registration statements were not filed and made effective
19 during a certain period of time.

20 In addition to that, if I recall there was also
21 rights related to participation in future financings. Rights
22 to participate in future finances, but not obligation.

23 And, there were also some provisions relating to
24 having a seat at the table in terms of being able to approve
25 subsequent PIPE transactions.

1 I believe that is the package of benefits that the
2 investors got.

3 Q And the ratchet protection you talked about last time,
4 that means, if the price drops, there is a subsequent PIPE,
5 you have a right to the adjustment, correct?

6 A Your warrant then becomes exercisable. So instead of 360
7 whatever that price is.

8 Q Those kinds of benefits, the discount off the stock
9 price, the warrant to-- sorry, just to be clear, a warrant is
10 an option to buy at a certain price, correct?

11 A That's right.

12 Q So, a discount, the warrants, the ratchet protection, all
13 of those, the value of those additional benefits would vary
14 depending on the market price for the company's stock,
15 correct?

16 A That is correct.

17 Q And it is your opinion investors in a PIPE transaction
18 would not typically look to make their investment in the open
19 market, even if the company's share price were to drop; is
20 that correct?

21 A If the time they are considering a PIPE transaction, yes.

22 Q And that is your opinion in paragraph 16?

23 A Yes.

24 Q And you said if the price did drop, they would be likely
25 to renegotiate the terms of the PIPE; is that correct?

Ferruolo - Cross - Smith

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1 A Yes.

2 Q So, if the PIPE was originally offered say at \$3 as it
3 was here, and then the share price dropped precipitously, the
4 PIPE investors would then want to renegotiate the buy in
5 price, correct?

6 A I am assuming they have not completed the documentation.
7 They are in the process of talking about a potential
8 investment, yes.

9 Q So the share price then would impact whether or not the
10 PIPE investor would buy in at a particular price in that case?

11 A Yes.

12 Q You also said that PIPE investors would not typically
13 make their investment in the open market. To be clear, you
14 don't know one way or the other whether the investors in the
15 February 2013 Retrophin PIPE, also made purchases of Retrophin
16 shares in the open market, correct?

17 A I do not, no.

18 Q You don't know one way or another, whether investors in
19 later PIPEs, like the August 2013, Retrophin PIPE, also made
20 shares-- purchases of shares on the open market, correct?

21 A I did not look at the stock purchase records of the
22 company, no.

23 Q And so that would include you don't know whether or not
24 the lead investors in either of those two PIPEs, made
25 purchases of shares in the open market, right?

1 A Those specific investors, no.

2 Q And it would be important to all investors in Retrophin,
3 PIPE investors or otherwise, to know whether the share price
4 of the company was artificially inflated, correct?

5 A I think there are a lot of assumptions behind that
6 question, but the answer would be, yes.

7 Q And, you testified that you represented companies making
8 offerings via PIPE transactions and as well as investors in
9 those PIPEs, right?

10 A That is correct.

11 Q In the course of representing a company, making a PIPE,
12 or making offering via PIPE, you worked on documents like the
13 share purchase agreement, right?

14 A It would be typical in a PIPE transaction for the lead
15 investors to draft those documents. So if I were representing
16 the company, I might draft some of the documents. But I would
17 review all the documents and mark up all the documents, things
18 like that, that is correct, yes.

19 Q You testified before that it was important for the reps
20 and warrantees in the share purchase agreement to be accurate,
21 correct?

22 A That is correct.

23 Q You said you reviewed the share purchase agreement for
24 the February 2013 Retrophin PIPE; is that right?

25 A Yes, I did.

Ferruolo - Cross - Smith

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1 Q I will show you what is marked as Government Exhibit 303,
2 it was admitted during the trial.

3 Mr. Ferruolo, do you know if you reviewed this
4 particular document?

5 A Yes, this looks like the document that I reviewed.

6 Q For the record, it is an E-mail from the defendant sent
7 on February 7th, 2013, at-- has a number of attachments, which
8 are described in the E-mail as the current draft forms of the
9 stock purchase agreement, the warrant and the registration
10 rights agreement.

11 A That is right. There is also an attached term sheet.

12 Q If you can just turn to the page that ends with Bates
13 number R023791.

14 A Yes.

15 Q This is the first page of the securities purchase
16 agreement for the February 2013 PIPE?

17 A Yes.

18 Q When you reviewed this agreement, you didn't do any
19 additional work to determine how these reps and warrantees
20 were included or whether or not these representations and
21 warrantees were actually complied with by the company,
22 correct?

23 A I did not have a copy, nor did I review the disclosure
24 schedule.

25 Q Did you ask to review the disclosure schedule?

1 A No.

2 Q Can you turn to the page ending in 816. For the record
3 the full Bates number is R023816.

4 A Yes.

5 Q The title of the Section 4.7 is "Use of Proceeds",
6 correct?

7 A Yes.

8 Q And it sets forth the ways in which Retrophin can use the
9 proceeds from the February 2013 PIPE, correct?

10 A Yes.

11 Q You have no personal knowledge of how the proceeds from
12 the February 2013 PIPE were actually used, correct?

13 A No direct knowledge-- these became part of the proceeds
14 of the company, I have reviewed. When reviewing the 34
15 filings, I reviewed the financial statements and reviewed the
16 cash flows and things like that.

17 Q But, you didn't review the bank records for the company,
18 correct?

19 A I did not, no.

20 MR. BRODSKY: All of this is outside of the scope of
21 direct. When it comes to Exhibit 303 and comes to the bank
22 records, we provided a list of what he reviewed. So now they
23 are going into documents that we did not show him and beyond
24 the scope of direct. I am happy to redirect on it if Your
25 Honor allows the Government to cross examine him on documents

Ferruolo - Redirect - Brodsky

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1 he has never reviewed before.

2 MS. SMITH: Your Honor, the witness said he reviewed
3 this particular E-mail. I am asking what other documents he
4 has been talking about, he also actually looked at.

5 THE COURT: All right. The objection is overruled,
6 Mr. Brodsky.

7 You can continue.

8 Q So, Mr. Ferruolo, you didn't actually look at any of the
9 bank records reflecting how the proceeds of the February 2013
10 PIPE were used, correct?

11 A No, I did not.

12 MS. SMITH: No further questions, Your Honor.

13 THE COURT: All right. Mr. Brodsky is going to ask
14 you just a few questions regarding an issue that was brought
15 up during your cross regarding your testimony before the SEC,
16 specifically regarding page 1266, regarding your testimony
17 about notes that were sent to the committee for review.

18 This will be a very circumscribed cross.

19 MR. BRODSKY: Thank you, Your Honor.

20 THE COURT: You may proceed.

21 You wanted to say something more, that is your
22 opportunity to do so.

23 THE WITNESS: Thank you.

24 REDIRECT EXAMINATION BY MR. BRODSKY:

25 Q Mr. Ferruolo, you just to set it up. To orient you, you

1 were asked questions by the Government on cross examination,
2 about sending draft minutes. And you had testified that you
3 send draft minutes to an officer of the company, usually the
4 CFO or CEO.

5 MS. SMITH: Objection Your Honor.

6 THE COURT: Sustained.

7 Q Were you then directed to--

8 THE COURT: Just go to the page that we were
9 discussing regarding the sending of his notes to a committee
10 for review. That is what I am giving you latitude for and
11 nothing else.

12 Q Dean Ferruolo, would you explain your answer to the
13 Government, where you indicated by your body language, you
14 wanted-- you had more to say. And you had testified you
15 usually sent the draft minutes to the CFO, CEO and then the
16 Government directed you to page-- Government Exhibit H6, SEC
17 the Sabhlok transcript, page?

18 THE COURT: 1266 lines 21.

19 Q 1266 lines 21 through the end of the page and then 1267.

20 A Yes.

21 I used the procedure here that I described that I
22 always used. I sent my draft minutes to Mr. Sabhlok in this
23 case, who is the CFO and Mr. Sabhlok sent those minutes to the
24 committee.

25 THE COURT: When you said, "committee", who is that?

1 THE WITNESS: In this case, these were audit
2 committee minutes, but it would be typical-- my primary
3 contact at Embarcadero Technologies was the CFO. He was the
4 one who mainly interacted with the Board and the Board
5 committees. All my draft minutes went to Mr. Sabhlok.
6 Through the -- basically through most of the time in this
7 company until there was a special investigation.

8 During this period of time, normal practice in the
9 industry is basically you send it to an officer of the company
10 and the company sends it on.

11 THE COURT: What, I'm sorry?

12 THE WITNESS: You send the draft minutes to the
13 primary officer of the company who interacts with the Board.
14 The Board-- that person at the company prepares the Board
15 package and sends those minutes to the committee or to the
16 Board as appropriate.

17 THE COURT: Thank you.

18 MR. BRODSKY: I know you indicated before, as to
19 what's-- whether I could ask additional questions, may I ask
20 additional questions on redirect?

21 THE COURT: No that is it.

22 Another subject or just this point?

23 MR. BRODSKY: I believe the point with respect to
24 who he was referring to when he testified about who the client
25 was should be clarified on redirect.

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1 MS. SMITH: Your Honor, you already ruled it was
2 done on direct.

3 THE COURT: It was done on direct. I don't think we
4 have any more need for redirect.

5 Anything else for this witness?

6 I think you are excused sir, have a safe flight back
7 to San Diego.

8 (Witness excused.)

9 THE COURT: Do you have another witness?

10 MR. BRODSKY: May we take a five-minute break to
11 confer with the client?

12 THE COURT: All right.

13 (Recess taken.)

14 THE COURT: Counsel, I gave you five minutes, you
15 had over ten. I summoned you through my courtroom deputy, you
16 refused to come. Can you let me know how you are planning to
17 proceed? I am either going to adjourn now, finish the hearing
18 or we will hear from your next witness. What would you like
19 to do?

20 MR. BRODSKY: We did come as soon as we were
21 summoned.

22 THE COURT: You didn't. Ms. Jackson went out and
23 Mr. Barry started to go out to retrieve you.

24 I want to know what we are doing here. You have had
25 over five minutes, what would you like to do?

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1 MR. BRODSKY: Yes, Your Honor. I just want to know,
2 you did give the Government thirty or forty minutes each time
3 to make a determination as to whether they were going to cross
4 examine a witness, in the last FATICO hearing. We are making
5 a very significant decision as to whether or not to call a
6 third witness. We have been given ten minutes of time.

7 THE COURT: I did not give them thirty or forty
8 minutes. Don't forget, you gave them disclosures the day
9 before or something outrageous.

10 I am tired of your trying to mischaracterize the
11 record. The lack of respect that you have shown for any of my
12 orders. This has gone on long enough Mr. Brodsky. Every time
13 you say, I'm sorry, you keep doing the same thing over and
14 over again.

15 All I want to know is whether you are calling your
16 last witness or not, or whether we are finished with this
17 hearing and we may all go back to our regular business.

18 MR. BRODSKY: Your Honor, we will not be calling Mr.
19 Prinsky.

20 THE COURT: All right. You are certainly welcome
21 to, I set aside the morning for his testimony if you would
22 like to call him.

23 MR. BRODSKY: I understand. Given the time we have
24 had to confer, I--

25 THE COURT: Now you are complaining about the time.

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1 Really.

2 MR. BRODSKY: No, Your Honor, we are not going to
3 call Mr. Prinsky.

4 THE COURT: You identified him weeks ago. You have
5 had more than enough time to figure out whether you are
6 calling him. Today was just a courtesy, additional courtesy
7 that I have extended to you.

8 All right. Anything else that you should address or
9 do the parties want to proceed based on this record and the
10 evidence in the record, or did you want an opportunity for
11 post hearing submissions? How would you like to proceed?

12 MR. BRODSKY: We would like an opportunity Your
13 Honor to submit something to Your Honor with respect to that.

14 THE COURT: Can you do that next week?

15 MR. BRODSKY: Yes.

16 THE COURT: What date?

17 MR. BRODSKY: May we submit it on Thursday,
18 June 28th.

19 THE COURT: Yes.

20 When does the Government want to respond?

21 MS. SMITH: Just one week, Your Honor, July 5th.

22 THE COURT: Given it is a holiday, I will give you
23 till Friday the 6th.

24 MS. SMITH: That would be great.

25 THE COURT: So, I will receive the submissions.

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1 Please provide two courtesy copies to my chambers and I will
2 hopefully have a decision for you.

3 I am concerned about the notes. I do feel that once
4 again, this was a situation where the notes appear to be of
5 fairly marginal relevance to the issue before the Court, which
6 is the loss, foreseeable loss caused by the conviction on
7 Count Seven.

8 As we know, these notes were ordered to be provided
9 on June 1st. Mr. Brodsky's excuse that he was not in a
10 position to review these personally, rings hollow frankly. He
11 has had more than enough time to comply with the Court's
12 orders and I believe that if these notes were so critical to
13 his position, he would have exercised more diligence to timely
14 provide the notes.

15 But that aside, I noted that the copy that I have of
16 these notes are largely illegible. There is no dispute that
17 Mr. Greebel wrote these notes, but I believe it is
18 fundamentally unfair to the Government to allow the defendant
19 years after the fact to provide an interpretation of his own
20 notes that are not subject to any sort of cross examination or
21 verification by the Government.

22 Again, as I note, I believe they are of marginal
23 relevance, therefore, I plan to preclude them.

24 Anything else?

25 MS. SMITH: No, Your Honor.

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1 THE COURT: Thank you.

2 MR. BRODSKY: No, Your Honor, thank you.

3 (Hearing concluded.)

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7 I CERTIFY that the foregoing
8 is a correct transcript from
9 the record of proceedings
in the above entitled matter.

9

10 s/Richard W. Barry

11 Richard W. Barry, RPR

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